

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 14 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 86-440
)	
Achernar Broadcasting Company)	File No. BPCT-860410KP
)	
Lindsay Television, Inc.)	File No. BPCT-860410KQ
)	
For Construction Permit)	
For a new TV Station on Channel 64 at)	
Charlottesville, Virginia)	

To: The Commission

**ENFORCEMENT BUREAU'S¹ OPPOSITION TO PLEADING FILED BY
THE GIVENS & BELL DIVISION OF BLUE RIDGE VIDEO SERVICES**

1. On May 30, 2000, the Givens & Bell Division of Blue Ridge Video Services ("Givens & Bell") filed an "opposition to" the Commission's Memorandum Opinion and Order,² which, inter alia, approved a settlement agreement filed January 30, 1998, by the above-captioned applicants, Achernar Broadcasting Company ("Achernar") and Lindsay

¹ By Order, 14 FCC Rcd 17924 (1999), the Commission created the Enforcement Bureau, effective November 8, 1999. One of the functions of the new Bureau is to serve as trial staff with regard to matters designated for hearing. See section 0.111(b) of the Commission's rules, 47 C.F.R. § 0.111(b). Although auctions, rather than comparative hearings, are now used to award construction permits for new full power broadcast facilities (see Amendment of Parts 1, 73 and 74 – Competitive Bidding, 13 FCC Rcd 15920 (1998), *recon. denied*, 14 FCC Rcd 8724 (1999), *petitions for reconsideration dismissed*, DA 00-445 (Mass Media Bureau, released March 1, 2000), the instant adjudicatory proceeding was never terminated, nor removed from hearing status, as a result of the applicants' settlement proposal filed on January 30, 1998. Thus, as a consequence of its creation, the Enforcement Bureau has replaced the Mass Media Bureau as a party to this proceeding.

² FCC 00-149, released April 28, 2000 (hereafter, "MO&O").

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Television (“Lindsay”). Pursuant to section 1.106(g) of the Commission’s rules,³ the Enforcement Bureau hereby opposes the Givens & Bell pleading.

2. Givens & Bell urges that the MO&O is arbitrary and capricious because it fails to account for an application for channel 64 in Charlottesville that Givens and Bell filed in October 1996, which was assigned File No. BPCT-19961023KF. Givens & Bell claims the filing occurred after it ascertained from a Mass Media Bureau staff member that the Achnar and Lindsay applications had been dismissed and that there were no current applications recognized as filed or pending by the Commission for channel 64. Givens & Bell understands that the Achnar and Lindsay applications were “reinstated” by the Commission sometime after a “1996 application window closed” and that, consequently, those applications became competing applications with the Givens & Bell application.⁴

3. Givens & Bell also claims that the engineering proposal relied upon by the applicants⁵ contains “fatal” flaws. Briefly listed, these “flaws” include: a failure to measure, fine tune and verify the effectiveness of the null, which is designed to protect the operations of the National Radio Astronomy Observatory at Green Bank, West Virginia (“Observatory”); the proposed use of an antenna that cannot be mounted on the specified tower at the place specified, both because it is physically impossible and because a site user will not give its permission to modify the tower; and the applicants’

³ 47 C.F.R. § 1.106(g).

⁴ Givens & Bell also reports that it has filed a petition for rulemaking to allot channel 19 to Charlottesville in response to DA 99-2605. *See Mass Media Bureau Announces Window Filing Opportunity*, 14 FCC Rcd 19559 (Mass Media Bureau 1999) (hereafter “Window Filing Public Notice”).

failure to verify that they have permission from the new tower owner to use the proposed antenna site.

4. Finally, Givens & Bell argues that the applicants cannot merge under the name “Charlottesville Broadcasting Corporation” as that name is already taken. In this regard, Givens & Bell notes that Charlottesville Broadcasting Corp. holds the licenses for various radio stations in the area. Thus, according to Givens & Bell, the MO&O’s grant of Achnar’s application has resulted in the grant of the construction permit for channel 64, as modified, to Charlottesville Broadcasting Corp., not the merged applicants.

Discussion

5. Notwithstanding the title given its pleading, Givens & Bell seeks reconsideration of the MO&O. Inasmuch as Givens & Bell never was a party to the instant proceeding and never previously sought to comment on the settlement approved by the MO&O, its right to have the MO&O reconsidered is governed by section 1.106(b)(1) of the Commission’s rules.⁶ That provision requires an entity, such as Givens & Bell, to state with particularity how its interests are adversely affected by the action and to show good reason why it was not possible for it to participate in the earlier stages of the proceeding. Assuming, *arguendo*, that Givens & Bell adequately stated why its interests are adversely affected, it is clear that Givens & Bell has made no attempt to demonstrate why it could not have participated earlier. Accordingly, dismissal of its pleading is warranted. *Cf., e.g., KOLA, Inc.*, 11 FCC Rcd 14297, 14302 (1996) (The Commission concluded that a petition for reconsideration should have been dismissed

⁵ As recited in the MO&O, the settlement between Achnar and Lindsay provides for their merger and the use of Achnar’s engineering proposal.

⁶ 47 C.F.R. § 1.106(b)(1).

when the petitioner had made no showing as to why he had not filed a timely objection to the grant of an assignment application.)

6. Moreover, none of Givens and Bell's arguments/claims warrant reconsideration of the MO&O. First, Givens & Bell is not now and never has been a valid applicant for channel 64. The Commission commenced the instant proceeding in 1986. By its own admission, Givens & Bell did not tender its application until 1996. At that time, contrary to Givens & Bell's understanding, the Achnar and Lindsay applications were still pending,⁷ and there was no provision under the Communications Act or the Commission's rules that authorized the filing of additional competing applications.⁸ Consequently, the Givens & Bell application was and still is patently defective, and the staff should have returned the Givens & Bell application as unacceptable for filing pursuant to section 73.3566(a) of the Commission's rules.⁹

⁷ See section 1.65(a) of the Commission's rules, 47 C.F.R. § 1.65(a).

⁸ In this regard, *see* sections 73.3564(a) - (c) and 73.3572(f) of the Commission's rules, as those provisions read in October 1996, when Givens & Bell tendered its application. 47 C.F.R. §§ 73.3564(a) - (c), 73.3572(f) (1996). Read together, those provisions made clear that the Givens & Bell application could not attain mutual exclusivity with Achnar and Lindsay applications and that, consequently, dismissal of the Givens & Bell application was warranted.

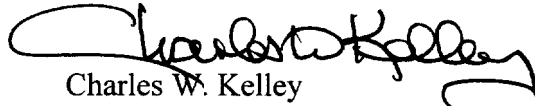
⁹ 47 C.F.R. § 73.3566(a). Likewise, the staff should dismiss the petition for rule making supposedly filed by Givens & Bell on March 13, 2000. Simply put, the Window Filing Public Notice upon which Givens & Bell relies gives it no right whatsoever. In this regard, the opportunity provided was available only to those who had filed certain petitions for rule making on or before July 25, 1996, or to those who had an application for a full power NTSC television station on file before September 20, 1996, or applications filed thereafter in response to a valid cutoff list. *See* 14 FCC Rcd at 19560. So far as the Bureau is aware, Givens & Bell cannot meet either condition.

7. Second, the Givens & Bell claims about the supposed defects in the Achernar engineering proposal – to the extent those claims are comprehensible – are without merit. In this regard, none of the pleading’s allegations are significant and none are supported by the affidavit of a person with personal knowledge of the facts alleged. Specifically, the claims regarding the potential adverse impact upon the Observatory are not supported by the affidavit of anyone from the Observatory. On the contrary, the Observatory, after years of litigation concerning the potential adverse effects of the applicants’ proposals upon its operations, withdrew its objection after the applicants developed a satisfactory plan for reducing radio frequency energy in the direction of the Observatory. Likewise, there is no affidavit from the owner of the proposed site, objecting to the applicants’ proposal.

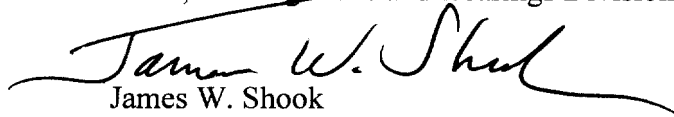
8. Finally, there is no merit whatsoever to Givens & Bell’s argument that the MO&O granted the permit to a non-party, the Charlottesville Broadcasting Corp. That entity has no connection with Achernar, the entity whose application, as modified, was granted. To the extent a problem exists because Achernar and Lindsay chose a corporate name already in use and unavailable to them, the problem can be solved by the applicants’ choosing a new name via a post-designation amendment or a modification application.

9. Accordingly, the Bureau opposes Givens & Bell's pleading and believes that dismissal is the appropriate treatment of that pleading.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Karen Richardson, secretary of the Enforcement Bureau's Investigations and Hearings Division certifies that she has on this 14th day of June, 2000, sent by facsimile or served by hand copies of the foregoing "Enforcement Bureau's Opposition to Pleading Filed by the Givens & Bell Division of Blue Ridge Video Services" to:

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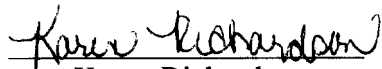
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